

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2005-CA-02137-COA**

**CYNTHIA SCARBOROUGH THOMAS**

**APPELLANT**

**v.**

**TOM SCARBOROUGH AND MARSHA  
SCARBOROUGH**

**APPELLEES**

DATE OF JUDGMENT:	10/13/2005
TRIAL JUDGE:	HON. THOMAS L. ZEBERT
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	PATRICK M. RAND
ATTORNEYS FOR APPELLEES:	DAVID L. MORROW, JR. JOHN R. ELLIOT, JR.
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	CIRCUIT COURT AWARDED INTERPLEADER FUND TO APPELLEES FINDING FORFEITURE PROVISION OF LEASE AGREEMENT UNCONSCIONABLE AS UNREASONABLY LARGE LIQUIDATED DAMAGES
DISPOSITION:	REVERSED AND RENDERED - 11/14/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE MYERS, P.J., SOUTHWICK AND GRIFFIS, JJ.**

**MYERS, P.J., FOR THE COURT:**

¶1. In an interpleader action filed by M-Tec Title and Escrow Services, Inc., and joined by Appellant Cynthia Thomas, the chancellor awarded the \$22,141.57 balance of the interpleader fund to Appellees Tom and Marsha Scarborough. Although the Scarboroughs breached a Lease Purchase Agreement for real property owned by Thomas, the court determined that an award of the funds to Thomas would constitute unreasonably large liquidated damages. Aggrieved by the trial court's ruling, Thomas appeals raising the following issues:

I. WHETHER THE CHANCERY COURT ERRED IN ADOPTING VERBATIM THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE SCARBOROUGHES?

II. WHETHER THE CHANCERY COURT ERRED IN APPLYING MISSISSIPPI CODE SECTION 75-2-718(1) TO THE DISPUTE INVOLVING A LEASE PURCHASE OF REAL PROPERTY AND THEREBY FINDING THE FORFEITURE OF THE \$30,000 EQUITY PAYMENT TO BE UNCONSCIONABLE?

¶2. Holding that the chancellor's findings of fact and conclusions of law as well as his interpretation of the Lease Purchase Agreement to be in error, we reverse and render in favor of the Appellant.

#### STATEMENT OF THE FACTS

¶3. On October 30, 2001, Tom and Marsha Scarborough entered into a Lease Purchase Agreement (Agreement) with Cynthia Thomas concerning real property located at 27 Thorngate Drive, Brandon, Mississippi 39042. The lease purchase contract, prepared by Thomas' attorney, provided that the Scarboroughs' would lease the subject property for forty-eight months at the rate of \$1,500 per month ("rent"), plus \$5,481.52 per annum ("additional rent"), pay all *ad valorem* taxes due on the property during the term of the lease, and pay a \$1,750 initial security deposit. At the conclusion of the lease term, the contract provided the Scarboroughs an option to purchase the subject property for \$54,815.18. The purchase price was computed as follows:

Agreed Purchase Price:	\$224,900.00
Prior Equity Credit	\$ 1,628.53
Current Equity Credit	\$ 30,000.00
Current Loan Balance	\$138,456.29
Purchase Price	\$ 54,815.18

The term "prior equity credit," in the amount of \$1,628.53, represents the amount paid by the Scarboroughs prior to signing the Agreement, and the amount of \$30,000, termed "current equity payment," represents the amount paid on the date of closing.

¶4. In May 2004, the Scarboroughts breached the Agreement by failing to timely pay rent. In July 2004, the Scarboroughts vacated the premises and requested that Thomas return the \$30,000 equity payment and \$1,750 security deposit; Thomas refused. The Scarboroughts filed a lis pendens on the property with the Chancery Clerk of Rankin County. When Thomas desired to sell the property to a third party, she agreed to deposit the disputed monies with the Rankin County Chancery Court in return for the Scarboroughts' release of the lis pendens. After deducting past due rent (\$3,875), past due additional rent (\$3,882.74), the Scarboroughts' share of unpaid property taxes (\$1,770.44), and a pool repair bill (\$80.25), Thomas deposited into the registry of the court, \$22,141.57 withheld from the funds she received at the closing of the sale of the property to the third party.

¶5. On December 7, 2004, M-Tec Title and Escrow Services, Inc., joined by Thomas, filed its complaint for interpleader. The Scarboroughts answered the complaint and requested that they be awarded the interpleader fund. The basis of their argument was the existence of an alleged ambiguity of definitions in the contract between paragraphs two and ten, and on the assertion that the forfeiture clause, found in paragraph ten of the Agreement, constitutes an unreasonable liquidated damages provision and an unconscionable penalty under Mississippi Code Annotated section 75-2-718(1). Thomas argues that the parties were free to contract, the language of the agreement is clear and unambiguous, and the forfeiture of the disputed monies is not liquidated damages, but rather a down payment on the purchase of the property.

¶6. In the case sub judice, the chancellor ruled only on the contract, exhibits, and briefs submitted by the parties; no hearings or oral arguments were held. He determined that an ambiguity exists between paragraphs two and ten concerning what would be forfeited in the event of default, and that such ambiguity should be construed against Thomas as drafter of the Agreement. Ruling for the Scarboroughts, the chancellor held that the an award of the interpleader fund to Thomas would

constitute an award of unreasonably large liquidated damages and therefore was an unconscionable penalty under Mississippi Code Annotated section 75-2-718(1). The chancellor further concluded that Thomas had failed to show any actual harm and had been made whole upon the resale of the property.

## LEGAL ANALYSIS

### I. WHETHER THE CHANCERY COURT ERRED IN ADOPTING VERBATIM THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE SCARBOROUGHES?

¶7. Thomas argues that the chancery court erred in adopting verbatim the proposed findings of fact and conclusions of law submitted by the Scarboroughes. In support of her arguments, she asserts that the chancellor made no independent inquiry into the facts of the case, but merely rubber-stamped the proposed findings of fact and conclusions of law submitted by the Scarboroughes. The Scarboroughes, in turn, argue that the chancellor is well within his discretion to adopt verbatim a party's findings of fact and conclusions of law. Additionally, the Scarboroughes argue that the chancellor's findings of fact and conclusions of law were almost, but not completely verbatim to those they submitted, and that the chancellor added his own findings, which tends to show independent insight and inquiry.

## DISCUSSION

¶8. The Mississippi Supreme Court has held that a trial court may, within its sound discretion, adopt verbatim or almost verbatim the findings of fact and conclusions of law submitted by a party. *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1266 (Miss. 1987). However, less deference is afforded to the chancellor's findings when the chancellor adopts verbatim or "almost verbatim" one party's findings of fact and conclusions of law. *Brooks v. Brooks*, 652 So. 2d 1113, 1118 (Miss. 1995). The problem with adopting verbatim, or almost verbatim, the findings submitted by counsel

is that these findings simply are not the same as findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and nuances of the case. Still, under our standard of review, “[t]his Court will not disturb the findings of the chancellor when supported by substantial evidence unless the chancellor has abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied.” *Sanderson v. Sanderson*, 824 So. 2d 623, 625-26, (¶18) (Miss. 2002)

¶9. Upon review of the record, it is apparent that the chancery court adopted the proposed findings of fact and conclusions of law submitted by the Scarboroughs, subject to a few additions. We note that Thomas failed to submit findings of fact and conclusions of law on her own behalf to the chancellor. This Court recognizes the complexities and nuances of individual cases, which in addition to crushing trial court caseloads necessitate substantial reliance upon the submissions of trial counsel. *Hiter*, 512 So. 2d at 1266. Therefore, this Court will not find such reliance to be in error so long as evidence exists which reasonably tends to support the chancellor’s findings. *Sanderson*, 824 So. 2d at 625-26 (¶18). Here, the chancellor was asked only to determine whether the Agreement was clear on its face concerning the equity payment and security deposit, and whether the forfeiture of these payments constituted unconscionable and unreasonably large liquidated damages. Although we are convinced that the chancery court committed no procedural error in adopting almost verbatim the Scarboroughs’ proposed findings of fact and conclusions of law, we find the chancellor to have reached erroneous conclusions of law, not supported by the evidence, and for reasons discussed below, reverse and render the ruling of the chancery court.

II. WHETHER THE CHANCERY COURT ERRED IN APPLYING MISSISSIPPI CODE SECTION 75-2-718(1) TO THE DISPUTE INVOLVING A LEASE PURCHASE OF REAL PROPERTY AND THEREBY FINDING THE FORFEITURE OF THE \$30,000 EQUITY PAYMENT TO BE UNCONSCIONABLE?

¶10. Thomas argues that the chancellor erred in applying Mississippi Code Annotated section 75-2-718(1) to a contract for the lease purchase of real property, and also in finding a forfeiture of the \$30,000 equity payment unconscionable. The Scarborougs argue that the chancellor followed the precedent established by the Mississippi Supreme Court in applying the equitable concepts of section 75-2-718(1) to a contract involving real property and that the chancellor properly found the forfeiture of the \$30,000 equity payment unconscionable.

### DISCUSSION

¶11. Statutory interpretations are questions of law. *Grand Casino Tunica v. Shindler*, 772 So. 2d 1036, 1038 (¶8) (Miss. 2000). “We conduct a de novo review for determinations of legal questions.” *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 721 (¶5) (Miss. 2002). Thus, in interpreting section 75-2-718(1) and its application to the Agreement now in dispute, this Court sits in the same position as if it were the Chancery Court of Rankin County. After thoroughly reviewing the Agreement, we conclude that it is clear and unambiguous on its face. The Agreement provided the terms of the lease, an option to purchase, and a specific provision for the forfeiture of all payments in the event of default. Both Thomas and the Scarborougs performed dutifully under the terms of the Agreement for approximately two and a half years before the Scarborougs breached the Agreement in May 2004, by failing to timely pay rent. The Scarborougs, now seek to recoup monies described in the Agreement as “current equity payment” (\$30,000) and “security deposit” (\$1,750), after having voluntarily breached the Agreement. They argue that an alleged contradiction between paragraph two and ten of the Agreement created and ambiguity concerning whether the current equity payment would be refunded in the event of breach by the lessee. Paragraph two, entitled “Rent/Lease Purchase,” states in relevant part:

Lessor and Lessee agree that payments of Rent, Additional Rent, and taxes will not be refunded or credited to Lessee if Lessee fails to purchase the Property in

accordance with the terms of this Lease and that all such payments will be deemed Rent earned by Lessor.

Paragraph ten, entitled “Default and Remedies” states in relevant part:

If a forfeiture is enforced at the sole option of the Lessor, Lessee shall forfeit all rights and interest in and to the Property and all appurtenances thereto and shall immediately surrender to Lessor peaceable possession of the Property and further *shall forfeit all payments made hereunder* together with all improvements placed on or in or made to the Property. (emphasis added).

¶12. The Scarboroughs contend that the failure of paragraph two to include the equity payment and security deposit as “payments,” that would not be refunded, renders the forfeiture of “all payments” under paragraph ten ambiguous, and that since Thomas’ attorney prepared the contract, any ambiguity should be construed against Thomas. Undoubtedly, “ambiguities in a contract are to be construed against the party who drafted the contract.” *Mason v. Mason*, 919 So. 2d 200, 204 (¶12) (Miss. Ct. App. 2005) (citing *Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994)). However, we find no ambiguity in the Agreement, as there is no conflict between paragraph two and paragraph ten. Paragraph two speaks only to the payments of rent, additional rent, and taxes as being non-refundable. The language used in the Agreement is standard contract language; the meaning is clear and does not in any way preclude the contract from separately establishing remedies available to the parties in the event of default. Paragraph ten, entitled “Default and Remedies,” clearly provides that in the event of default the lessee “shall forfeit all payments made hereunder [the Agreement].” Thus, we decline to allow a party, who operated with full knowledge of the financial implications associated with default, to escape their bargained-for liability on an unsupported claim of ambiguity.

¶13. Alternatively, the Scarboroughs argue that, even if the Agreement is unambiguous, the forfeiture of the current equity payment is an unreasonably large liquidated damages provision under section 75-2-718(1). The code section provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Miss. Code Ann. §75-2-718(1) (Rev. 2002). Thomas argues that an application of this code section to a lease purchase of real property is in error because Title 75 is an adoption of the Uniform Commercial Code, only applicable to goods and services, and inapplicable to contracts concerning real property.

¶14. The Mississippi Supreme Court has recognized the logic behind the U.C.C.'s treatment of liquidated damages in goods and services contracts, and has applied that logic to land sale contracts. *Maxey v. Glindmeyer*, 379 So. 2d 297, 301 (Miss. 1980). In *Maxey*, an express liquidated damages provision was held unconscionable and unreasonably large where the ipso facto forfeiture of a \$75,000 down payment on a \$150,000 residence resulted due to a breach of contract attributed to the buyer. The Supreme Court held that the forfeiture was unreasonable because it would be imposed regardless of whether the seller had suffered \$75,000 in damages or not. *Id.* The forfeiture was reversed and a new hearing was ordered to determine an amount which would adequately reimburse the seller for her loss. *Id.*

¶15. The case at bar can easily be distinguished from *Maxey*. First, there was no express liquidated damages clause in the Thomas/Scarborough Agreement; rather the Agreement stated that in the event of default, "all payments" would be forfeited to Thomas. Second, the down payment forfeited in *Maxey* represented fifty percent of the total purchase price. Here, the forfeiture of the \$30,000 current equity payment and \$1,750 security deposit represents a mere fourteen percent of the total purchase price of \$224,900. Finally and most significant to our analysis, the only way in which Thomas may be reimbursed for the loss she suffered as a result of the Scarboroughs' breach



is to be awarded the interpleader fund. Had the Agreement been carried out to fruition and the option to purchase been exercised by the Scarboroughs, Thomas would have netted an \$86,443.82 profit. Upon resale of the property following the Scarboroughs' breach, Thomas netted only \$46,886.48, after placing \$22,141.57 into the interpleader fund. The chancellor incorrectly determined that Thomas was made whole by the resale because she realized a profit. A proper analysis of the loss imposed upon Thomas by the Scarboroughs' breach is not to determine whether Thomas realized a profit from the subsequent sale, but rather whether the profit realized was comparable to the profit she would have made had the Agreement not been breached. Thomas would have received nearly double the amount she has thus far realized had the Scarboroughs followed through on their contractual obligation. We find that Thomas cannot be adequately compensated without an award of the disputed \$22,141.57 interpleader fund, and should not be penalized for making a good faith effort to cover following the Scarboroughs' breach. Although we recognize that courts of equity abhor forfeitures, in this case it is the only just result. *Id.* at 300.

#### CONCLUSION

¶16. We find the forfeiture of the \$30,000 current equity payment and \$1,750 security deposit to be neither an unreasonably large liquidated damages provision nor an unconscionable penalty. Therefore, we reverse the ruling of the chancery court awarding the \$22,141.57 interpleader fund to the Scarboroughs and order that amount returned to the registry of the court and paid to Thomas in accordance with this holding.

**¶17. THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS REVERSED AND RENDERED AS A JUDGMENT IN FAVOR OF THE APPELLANT IN THE AMOUNT OF \$22,141.57. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

**KING, C.J., LEE, P.J., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, AND ROBERTS, JJ., CONCUR.**